

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Timothy J. Muris, Chairman
Sheila F. Anthony
Mozelle W. Thompson
Orson Swindle
Thomas B. Leary

In the Matter of)
)
)

AMGEN INC.,)

a corporation;)

and)

IMMUNEX CORPORATION,)

a corporation.)
)
)
)

Docket No. C-4053

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed merger between Respondent Amgen Inc. (“Amgen”) and Respondent Immunex Corporation (“Immunex”), hereinafter referred to as “Respondents,” and the Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing the proposed Decision and Order, an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

1. Respondent Amgen is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at One Amgen Center Drive, Thousand Oaks, California 91320-1799.
2. Respondent Immunex is a corporation organized, existing and doing business under and by virtue of the laws of the state of Washington, with its office and principal place of business located at 51 University Street, Seattle, Washington 98101.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order to Maintain Assets, the definitions used in the Consent Agreement and the attached Decision and Order shall apply.

II.

IT IS FURTHER ORDERED that from the date this Order to Maintain Assets becomes final:

- A. Respondents shall take such actions as are reasonably necessary to maintain the viability, marketability, and competitive vigor of the Leukine Assets, and shall prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer or impairment of the Leukine Assets, except for ordinary wear and tear and as otherwise would occur in the ordinary course of business.

- B. Respondents shall maintain the operations of the Leukine Assets in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the Leukine Assets) and shall use their best efforts to preserve the existing relationships with suppliers, vendors, customers, employees, and others having business relations with the Leukine Assets. Respondents' responsibilities shall include, but are not limited to:
1. providing the Leukine Assets with sufficient working capital to operate the Leukine Assets at least at current rates of operation, to meet all capital calls with respect to the Leukine Assets and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for the Leukine Assets;
 2. continuing, at least at their scheduled pace, any additional expenditures for the Leukine Assets authorized prior to the date the Consent Agreement was signed by Respondents;
 3. making available for use by the Leukine Assets funds sufficient to perform all necessary routine maintenance to, and replacements of, the Leukine Assets;
 4. providing the Leukine Assets with such funds as are necessary to maintain the viability, competitive vigor, and marketability of the Leukine Assets;
 5. providing such support services to the Leukine Assets as are being provided to this business by Respondent Immunex as of the date the Consent Agreement was signed by Respondents.
- C. Respondents shall maintain a work force equivalent in size, training, and expertise to what has been associated with the Leukine Assets.
- D. Respondents shall provide all Leukine Core Employees and all Leukine Sales Employees with reasonable financial incentives to continue in their positions until the Closing Date in accordance with Section 3.13(a)(i) of the Leukine Seller Disclosure Letter, which identifies employees and their respective coverage under the Immunex Corporation Retention Plan, as adopted December 16, 2001 ("Retention Plan"). Such incentives shall include a continuation of all employee benefits offered by Respondents until the Closing Date for the divestiture of the Leukine Assets has occurred, including regularly scheduled raises and bonuses, and a vesting of all pension benefits (as permitted by law). In addition to the foregoing, Respondents shall provide to each Leukine Manufacturing Employee who (i) is not included in levels one through six of the Retention Plan as disclosed in Section 3.13(a)(i) of the Leukine Seller Disclosure Letter and (ii) accepts employment with the Commission-approved Acquirer, an incentive equal to three (3) months of such employee's base annual salary to be paid upon the employee's completion of one (1) year of employment with the Commission-approved Acquirer.

Provided, however, this Paragraph shall not be construed to require the Respondents to terminate the employment of any employee.

- E. Prior to the Closing Date, Respondents shall not interfere with the hiring or employing of Leukine Sales Employees and Leukine Core Employees by Schering, or any entity subsequently proposed by the Respondents or a Divestiture Trustee to the Commission as an acquirer of the Leukine Assets (“Proposed Acquirer”), and shall remove any impediments within the control of Respondents that may deter these employees from accepting employment related to the Leukine Assets with Schering or the Proposed Acquirer, including, but not limited to, any non-compete provisions of employment or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by either Schering or the Proposed Acquirer. In addition, Respondents shall not make any counteroffer to a Leukine Sales Employee or Leukine Core Employee who receives a written offer of employment from Schering or the Proposed Acquirer.

Provided, however, that this Paragraph II.E. does not prohibit the Respondents from making offers to any Leukine Sales Employee or Leukine Core Employee where either Schering or the Proposed Acquirer has notified the Respondents in writing that it does not intend to make an offer of employment to that employee.

Provided further, that if the Respondents notify Schering or the Proposed Acquirer in writing of their desire to make an offer of employment to a particular Leukine Core Employee or Leukine Sales Employee, and Schering or the Proposed Acquirer does not make an offer of employment to that employee within twenty (20) Business Days of the date Schering or the Proposed Acquirer receives such notice, the Respondents may make an offer of employment to that employee.

- F. Respondents shall provide written notification of the restrictions on the use of the Confidential Business Information related to Leukine by Respondents’ personnel and of the restrictions on the sale of Neupogen or Neulasta or any other Neutrophil Regeneration Product by certain Immunex personnel to all of Respondents’ employees who (i) are involved in the research, manufacturing, distribution, sale or marketing of Leukine, (ii) are involved in the research, manufacturing, distribution, sale or marketing of Neupogen or Neulasta or any other Neutrophil Regeneration Product and/or (iii) may have Confidential Business Information related to Leukine. Respondents shall give such notification by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the Closing Date. Respondents shall provide a copy of such notification to Schering or the Proposed Acquirer. Respondents shall also obtain from each employee covered by this Paragraph II. F. an agreement to abide by the applicable restrictions. Such agreement and notification shall be in substantially the form set forth in the “Notice of

Divestiture and Employee Agreement to Maintain Non-Public Business Information Related to Leukine Confidential” attached as Appendix A to this Order and as Appendix V to the Decision and Order. Respondents shall maintain complete records of all such agreements at Respondents’ corporate headquarters and shall provide an officer’s certification to the Commission, stating that such acknowledgment program has been implemented and is being complied with. Respondents shall monitor the implementation by their sales forces of all applicable restrictions, including the provision of written reminders to all such sales personnel at three (3) month intervals until the expiration of the time periods set forth in all Divestiture Agreements, including those in the Leukine Asset Purchase Agreement, and take corrective actions for the failure of sales personnel to comply with such restrictions or to furnish the written agreements and acknowledgments required by this Order. Respondents shall provide Schering or the Proposed Acquirer with copies of all certifications, notifications and reminders sent to Respondents’ personnel.

- G. Respondents shall adhere to and abide by the Divestiture Agreement incorporated by reference into this Order to Maintain Assets and made a part hereof.

III.

IT IS FURTHER ORDERED that:

- A. At any time after Respondents sign the Consent Agreement, the Commission may appoint an Interim Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order to Maintain Assets and by the Decision and Order (collectively, “the Orders”).
- B. If an Interim Monitor is appointed pursuant to Paragraph III.A. of this Order to Maintain Assets or Paragraph V.A. of the Decision and Order in this matter, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
 - 1. The Commission shall select the Interim Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If neither Respondent has opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.
 - 2. The Interim Monitor shall have the power and authority to monitor the Respondents’

compliance with the terms of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.

3. Within ten (10) days after appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant terms of the Orders in a manner consistent with the purposes of the Orders.
4. The Interim Monitor shall serve until the later of:
 - a. when the Leukine Assets have been divested in a manner that fully satisfies the requirements of the Orders and the Commission-approved Acquirer is fully capable of, independently of Respondents, producing Leukine acquired pursuant to a Divestiture Agreement; or
 - b. when the last obligation under the Orders pertaining to the Interim Monitor's service has been fully performed.

Provided, however, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

5. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and any other relevant information as the Interim Monitor may reasonably request, relating to Respondents' compliance with their obligations under the Orders, including, but not limited to, their obligations relating to the Leukine Assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders.
6. The Interim Monitor shall serve, without bond or other security, at the expense of Respondents on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of the Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities. The Interim Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission. The Commission may, among other things, require the

Interim Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Interim Monitor's duties.

7. Respondents shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.
 8. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in Paragraph III.A. of this Order to Maintain Assets or Paragraph V.A. of the Decision and Order in this matter.
 9. The Commission may on its own initiative or at the request of the Interim Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.
 10. Respondents shall report to the Interim Monitor in accordance with the requirements of Paragraph VII.A. of the Decision and Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by the Commission-approved Acquirer with respect to the performance of Respondents' obligations under the Orders or the Divestiture Agreement. Within one (1) month from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning compliance by Respondents with the provisions of the Orders.
 11. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
- C. The Interim Monitor appointed pursuant to Paragraph III.A. of this Order to Maintain Assets may be the same Person appointed as Divestiture Trustee pursuant to Paragraph VI.A. of the Decision and Order in this matter.

IV.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in either corporate Respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order to Maintain Assets.

V.

IT IS FURTHER ORDERED that, for the purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents made to their principal United States offices, Respondents shall permit any duly authorized representatives of the Commission:

- A. Access, during office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondents relating to compliance with this Order to Maintain Assets; and
- B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

VI.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate on the earlier of:

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The day after the divestiture of all of the Leukine Assets, as described in and required by the attached Decision and Order, is completed.

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED: July 12, 2002

**APPENDIX A
TO THE ORDER TO MAINTAIN ASSETS**

**APPENDIX V
TO THE DECISION AND ORDER**

NOTICE OF DIVESTITURE AND EMPLOYEE AGREEMENT TO MAINTAIN NON-PUBLIC BUSINESS INFORMATION RELATED TO LEUKINE CONFIDENTIAL

On [date], Amgen Inc. (“Amgen”) and Immunex Corporation (“Immunex”), hereinafter referred to collectively as “Respondents,” entered into an Agreement Containing Consent Orders (“Consent Agreement”) with the Federal Trade Commission (“FTC”) relating to the divestiture of certain assets. That Consent Agreement includes two orders: (i) the Decision and Order, and (ii) the Order to Maintain Assets. The Decision and Order requires the divestiture of assets relating to the Leukine business of Immunex. These assets are hereinafter referred to as the “Leukine Assets.” The Order to Maintain Assets requires Respondents to maintain the Leukine Assets pending divestiture of these assets. Both the Decision and Order and the Order to Maintain Assets require Respondents to commit that no Confidential Business Information relating to the Leukine Assets will be disclosed to or used by any employee of the combined entity formed by the merger of Amgen and Immunex (“Combined Entity”), except under specified circumstances. In particular, this restriction is to protect such information from being used in any way for the research, development, sale or manufacture of Neupogen or Neulasta or any other Neutrophil Regeneration Product that may be commercialized by the Combined Entity after the proposed merger. The Decision and Order also requires the divestiture of documents (including electronically stored material) that contain Confidential Business Information related to the Leukine Business. Accordingly, no employee of the Combined Entity may maintain copies of documents containing such information.

Under the Decision and Order, the Respondents are required to divest all of the Leukine Assets to an acquirer that must be approved by the FTC. Schering Aktiengesellschaft has been proposed to the FTC as the acquirer for these assets. Until the divestiture of all of the Leukine Assets occurs, the requirements of the second order – the Order to Maintain Assets – are in place to insure the continued marketability, viability and competitive vigor of the Leukine Assets. This includes preserving the work force that performs functions related to the Leukine Assets.

You are receiving this notice because you (i) have work responsibilities related to Leukine, (ii) have work responsibilities related to Neulasta or Neupogen, or (iii) might have Confidential Business Information in your possession related to Leukine.

All Confidential Business Information related to Leukine must be retained and maintained by the

persons involved in the operation of that business on a confidential basis. Such persons must not provide, discuss, exchange, circulate, or otherwise disclose any such information to or with any other person whose employment involves responsibilities unrelated to the Leukine Assets (such as persons with job responsibilities related to Amgen's Neupogen or Neulasta businesses). In addition, any person who possesses such Confidential Business Information related to the Leukine Assets and who becomes involved in the Combined Entity's business related to Neupogen, Neulasta or any other Neutrophil Regeneration Product must not provide, discuss, exchange, circulate, or otherwise disclose any such information to or with any other person whose employment relates to such businesses. Finally, if you have documents that you believe might be considered Confidential Business Information related to Leukine and have not received specific instructions as to how the documents in your possession should be disposed of, you should contact the contact person identified at the end of this notice.

For the purposes herein, "Confidential Business Information" means all information owned or controlled by Immunex that is not in the public domain related to the research, development, manufacturing, marketing, commercialization, distribution, importation, cost, pricing, supply, sales, sales support or use of Leukine.

Any violation of the Decision and Order or the Order to Maintain Assets may subject Amgen, Immunex, or the Combined Entity to civil penalties and other relief as provided by law.

CONTACT PERSON

If you have questions regarding the contents of this notice, the confidentiality of information, the Decision and Order or the Order to Maintain Assets, you should contact _____ at ____ - ____ - _____, e-mail address: _____.

ACKNOWLEDGMENT

I, _____ (print name), hereby acknowledge that I have read the above notification and agree to abide by its provisions.